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Department of the Treasury
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[Third Party Communication:
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Date:
April 20, 2007

Legend

A =

B =

C =

D =

$$E =$$

Fund X =

Trust Y =

FC =

State 1 =

State2 =

Year 1 =

Year 2 =

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This is in response to your letter dated August 22, 2006, requesting the consent of the Commissioner to make a retroactive qualified electing fund ("QEF") election under Treas. Reg. §1.1295-3(f) with respect to A's and B's ("Taxpayers") investments in FC.

The ruling contained in this letter is based upon facts and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for a ruling, such material is subject to verification upon examination.

FACTS

Taxpayers are regulated investment companies under section 851 of the Internal Revenue Code ("Code"). Each is treated as a separate taxpayer under section 851(g). A is a separate series of Fund X, a corporation organized under the laws of State 1, and B is a separate series of Trust Y, a business trust organized under the laws of State 2. Taxpayers are managed by C and both are calendar year taxpayers.

In Year 1, Taxpayers each acquired stock in FC, a foreign corporation that was a passive foreign investment company ("PFIC") under section 1297 of the Internal Revenue Code ("Code").

For the taxable year ended December 31, Year 1, Taxpayers contracted with D to perform administrative services for them. These administrative services included preparing federal income tax returns and recommending appropriate tax elections and filing requirements. Taxpayers represent that D employed tax accountants who were competent to render international tax advice with respect to stock ownership of a foreign corporation and, in particular, were highly experienced in preparing federal income tax returns, and in identifying PFICs. Ds' tax accountants had complete access to Taxpayers' records, including lists of stocks purchased by them, as well as access to financial information relevant to FC and access to all other relevant facts and circumstances regarding their ownership of FC stock.

Ds' tax accountants failed to identify FC as a PFIC and failed to advise Taxpayers of the possibility of making, or the consequences of failing to make, a QEF election with respect to FC. As a result, Taxpayers failed to make the QEF election pursuant to section 1295 on their Year 1 federal income tax returns.

In Year 2, E, a professional accounting firm, performed a review of the stocks owned by Taxpayers in order to identify any PFICs in which they had invested. In the course of its review, E identified FC as a PFIC since Year 1.

Taxpayers have submitted affidavits executed by Ds' tax accountants which reflect the above statements concerning their failure to advise Taxpayers of the possibility of making, or the consequences of failing to make, a QEF election and the events leading to the discovery thereof.

Taxpayers represent that the PFIC status of FC has not been raised by the IRS on audit for any of their taxable years.

RULING REQUESTED

Taxpayers request the consent of the Commissioner of the Internal Revenue Service to make a retroactive QEF election under Treas. Reg. § 1.1295-3(f) with respect to their Year 1 taxable year.

LAW AND ANALYSIS

Section 1295(a) provides that any PFIC shall be treated as a QEF with respect to a taxpayer if (1) an election by the taxpayer under section 1295(b) applies to such company for the taxable year and (2) the company complies with such requirements as the Secretary may prescribe for purposes of determining the ordinary earnings and net capital gains of such company.

Under section 1295(b)(2), a QEF election may be made for any taxable year at any time on or before the due date (determined with regard to extensions) for filing the return for such taxable year. To the extent provided in regulations, such an election may be made after such due date if the taxpayer failed to make an election by the due date because the taxpayer reasonably believed the company was not a PFIC.

Under Treas. Reg. § 1.1295-3(f), a taxpayer may request the consent of the Commissioner to make a retroactive QEF election for a taxable year. However, the Commissioner will grant relief under Treas. Reg. § 1.1295-3(f) only if four conditions are satisfied. The first requirement is that the shareholder reasonably relied on a qualified tax professional, who failed to identify the foreign corporation as a PFIC or failed to advise the shareholder of the consequences of making, or failing to make, a section 1295 election. Treas. Reg. § 1.1295-3(f)(2) provides that a shareholder will not be considered to have reasonably relied on a qualified tax professional if the shareholder knew, or reasonably should have known, that the foreign corporation was a PFIC and knew of the availability of a section 1295 election. In addition, a shareholder cannot claim reliance upon a tax professional if he knew or reasonably should have known that the qualified tax professional was not competent to render tax advice with respect to the ownership of shares of a foreign corporation or did not have access to all relevant facts and circumstances.

During the years at issue in this case, Taxpayers relied upon the tax accountants employed by D for all U.S. income tax advice. Ds' tax accountants were competent to render U.S. tax advice with respect to stock ownership of a foreign corporation and had access to all the relevant facts and circumstances. In preparing Taxpayers' Year 1

federal income tax returns, they failed to make the QEF election, and failed to advise the Taxpayers of the consequences of making or failing to make such an election. Thus, Taxpayers reasonably relied on a qualified tax professional within the meaning of Treas. Reg. § 1.1295-3(f)(1)(i) and (2) for Year 1.

The second requirement of Treas. Reg. § 1.1295-3(f) is that granting consent will not prejudice the interests of the U.S. government. Under Treas. Reg. § 1.1295-3(f)(3)(i), the interests of the U.S. government are prejudiced if granting relief would result in the shareholder having a lower tax liability, taking into account applicable interest charges, in the aggregate for all years affected by the retroactive election (other than by a de minimis amount) than the shareholder would have had if the shareholder had made the section 1295 election by the election due date. The time value of money is taken into account for purposes of this computation. If granting relief would prejudice the interests of the U.S. government, the Commissioner may, in his sole discretion, grant consent to make the election provided the shareholder enters into a closing agreement with the Commissioner that requires the shareholder to pay an amount sufficient to eliminate any prejudice to the U.S. government as a consequence of the shareholder's inability to file amended returns for closed taxable years. Treas. Reg. § 1.1295-3(f)(3)(ii).

In the present case, neither the Year 1 taxable year nor subsequent tax years currently are closed. Thus, the interests of the U.S. government will not be prejudiced by allowing Taxpayers to make a retroactive section 1295 election.

The third requirement of Treas. Reg. § 1.1295-3(f) is that the request must be made before a representative of the Internal Revenue Service raises upon audit the PFIC status of the corporation for any taxable year of the shareholder. Treas. Reg. § 1.1295-3(f)(1)(iii). In this case, the PFIC status of FC has not been raised upon audit.

The final requirement of Treas. Reg. § 1.1295-3(f) is that the procedural requirements set forth in Treas. Reg. § 1.1295-3(f)(4) must be met. These include filing a request for consent to make a retroactive election with, and submitting a user fee to, the Office of the Associate Chief Counsel (International). Treas. Reg. § 1.1295-3(f)(4)(i). Additionally, affidavits signed under penalties of perjury must be submitted by the shareholder and any qualified tax professional upon whose advice the shareholder relied. Treas. Reg. § 1.1295-3(f)(4)(ii), (iii). These affidavits must describe the events that led to the failure to make a QEF election by the election due date, the discovery of such failure, and the engagement and responsibilities of the qualified tax professional and the extent to which the shareholder relied on such professional. Here, affidavits meeting the requirements set forth in Treas. Reg. § 1.1295-3(f)(4)(ii) and (iii) as to the failure of Ds' tax accountants to inform Taxpayers of their need to make QEF elections have been submitted and Taxpayers have otherwise satisfied the procedural requirements of Treas. Reg. § 1.1295-3(f)(4).

Based on the information submitted and representations made:

Consent is granted to Taxpayers to make a retroactive election with respect to Year 1, under Treas. Reg. § 1.1295-3(f), provided that they comply with the rules under Treas. Reg. § 1.1295-3(g) regarding the time and manner for making the retroactive QEF election.

This private letter ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

A copy of this ruling must be attached to any tax return to which it is relevant.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to taxpayer's first representative.

Sincerely,

Valerie Mark Lippe
Senior Technical Reviewer, CC:INTL:B02
Office of Associate Chief Counsel
(International)